No. 88-266

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

JAN GRAHAM, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AMICUS CURIAE THE OTOE-MISSOURIA TRIBE OF INDIANS IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

This case presents an issue of substantial importance to the Otoe-Missouria Tribe of Indians, a federally recognized Indian tribe located in the State of Oklahoma, which, like the Chickasaw Nation, operates gaming and other tribal enterprises within the Indian country free from State judicial and legislative control. Amicus Curiae Otoe-Missouria Tribe of Indians has obtained consent of the parties to file a brief in support of Respondents.

The United States Court of Appeals for the Tenth Circuit concluded on remand, as in the previous Tenth Circuit decision, that the subject matter of this case, involving as it does State pretensions to governmental authority over the Chickasaw Nation in conflict with the exclusively federal parameters defining the legal status of Indian tribes, is not one where a choice exists between equally applicable, legitimate and concurrent federal and state law claims, such as were involved in *Caterpillar Inc. v. Williams*, 482 U.S. ___, 96 L. Ed. 2d 318 (1986), and where the Plaintiff, as master of his claim is free to choose the one and ignore the other relying on the body of law of his preference to ground his cause of action. Rather, the Tenth Circuit concluded, in essence, that the extent of governmental authority legitimately exercised by States over Indian tribal governments is exclusively referenced by federal, not state law. And, as such, the Oklahoma Tax Commission's radical assertion of State governmental authority over the Chickasaw Nation referencing only State law in an action filed in the District Court of Murray County, Oklahoma is essentially asserting a federal claim regardless of the Tax Commission's characterization of its cause of action resulting in the artful pleading doctrine thwarting the Tax Commission's choice of a State forum. The Tenth Circuit further concluded that the Tax Commission's complaint was not "well-plead" and the complaint falling within a preempted field of law, as it does, arises under federal law. In that the Tenth Circuit's decisions are grounded on the principle that state law does not exist as an independent source of State governmental jurisdiction over the Chickasaw Nation, the Tenth Circuit's decisions are square with *Caterpillar*'s holding that the complete preemption

corollary to the well-pleaded complaint rule raises federal preemption, particularly in Indian cases, as substantive federal law and not as a defense.

At this point, in order to place the interest of the Otoe-Missouria Tribe of Indians as amicus curiae in perspective, a characterization of what is at stake is appropriate. This case presents an attempt by an agency of a State to extend the legislative and judicial jurisdiction of a state government over an Indian tribe specifically in the form of a tax on tribal activities and subjecting the Tribe to the coercive jurisdiction of state courts to enforce the tax in avoidance of federal law and longstanding federal and tribal interests. Incredibly, the State agency urges a rule herein that would bar Indian tribes from removing such extra-legal actions to federal courts and require adjudication in State courts, which have been declared by force of federal law to be jurisdictionally deficient in these circumstances. *Williams v. Lee*, 358 U.S. 217 (1959); *Fisher v. District Court*, 424 U.S. 382 (1978); *Kennerly v. District Court of Montana*, 400 U.S. 423 (1971); *Three Affiliated Tribes v. Wold Engineering, Inc.*, 476 U.S. 877 (1986). The seemingly apparent motive is to "shop" a more friendly forum.

At issue, then, is the sovereignty of Indian tribes. In *M'Culloch v. Maryland*, 4 Wheat 316, 4 L. Ed. 579, 607 (1819), this Honorable Court, in considering the dividing point between federal and state authority, said that "the power to tax involves the power [of a state] to destroy" in that inevitably the entity subject to the power must depend ultimately upon the discretion of the State government for its very existence. The logical extension of the rule urged herein by Petitioner would necessitate a finding

that the power to define the limits of tribal sovereignty exists inherently by virtue of State action independent of federal sanction. This unacceptably high price to tribal sovereignty simply cannot be reconciled with Congress' jealous regard for Indian self-governance. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983).

A decision that bars Indian tribes from claiming the traditional protection of federal courts in removal actions strikes at the very heart of federally protected tribal sovereignty and its foundation in federal, not state, law. For these reasons, the Otoe-Missouria Tribe of Indians has an essential and compelling interest in the outcome of the case at bar.

I. THE LOWER COURTS CORRECTLY RULED THAT THIS CASE WAS PROPERLY REMOVED FROM STATE COURT SINCE UPON THE COMMENCEMENT OF THIS ACTION THE STATE DISTRICT COURT WHOLLY LACKED SUBJECT MATTER JURISDICTION OVER THE CHICKASAW NATION INVOLVING ACTIVITIES WHICH OCCURRED IN INDIAN COUNTRY.

Amicus submits that the case was properly removed and that federal question jurisdiction compliance with 28 U.S.C. § 1446(e) effects the removal. Nothing further is required to vest the federal district court with jurisdiction. *Butler v. King*, 718 F.2d 486 (5th Cir. 1986). After removal, the federal district court may exercise its threshold jurisdiction to determine jurisdiction of the state court. *Chicot Co. Drainage v. Baxter State Barnk*, 308 U.S. 371, 376 (1940); *Minnesota v. United States*, 305 U.S. 382, 389 (1939). If subject matter jurisdiction is exclusively within the state court's jurisdiction, the court will order remand.

However, if diversity of the parties or federal question jurisdiction is present the case will remain with

the federal court unless such court is without subject matter or in personam jurisdiction, in which case the complaint will be dismissed. Additionally, if the state court lacks either personal jurisdiction or subject matter jurisdiction over the cause of action the federal district court will dismiss the action. Jurisdiction of the federal court on removal is in a limited sense a "derivative jurisdiction". *Minnesota*, supra at 389; *Lambert Run Coal Company v. Baltimore Railroad & O.R. Co.*,258 U.S. 377, 383 (1922); and the federal court is required to dismiss rather than remand even though the federal court may have had original jurisdiction had the case initially been filed with the federal court. This is the posture in which the circuit court placed the present case.

II. FEDERAL QUESTION JURISDICTION ARISING OUT OF FEDERAL COMMON LAW, FEDERAL STATUTES, AND THE CONSTITUTION APPEARS ON THE FACE OF THE COMPLAINT.

While Indian tribal sovereignty predates the formation of the United States, it was expressly acknowledged in the Commerce Clause, Article I, Section 8, Cl. 3 which provides that Congress "regulate commerce . . . with the Indian tribes." Decisions interpreting this provision have come from what is known as the federal common law as it relates to Indian tribes. The common law comprises the body of those principles and rules of action, relating to the government and security of persons and property which derive their authority solely from usages and customs of immemorial antiquity or from judgments and decrees of the Court recognizing, affirming and enforcing such usages and customs. *Western Union Tel. Co. v. Call Publishing Co.*, 181 U.S. 92 (1901). For the most part, this and the lower federal courts

have carved out the meaning of this doctrine through the years commencing with decisions beginning with *Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543 (1823) through *California v. Cabazon Band of Mission Indians*, 480 U.S. ___, 94 L. Ed. 2d 244 (1987). However, federal courts have not wavered from the concept that lack of subject matter jurisdiction prevents the courts from litigating questions raised before them.

Title 28 U.S.C. § 1441 and 28 U.S.C. § 1331 are governing statutes for removal to federal court. While it appears that this Court has not addressed 28 U.S.C. § 1441 in regard to Indian tribes, it has addressed 28 U.S.C. 1331 and the applicability of federal common law as a basis for federal question jurisdiction as it relates to § 1331. The test for each of these statutory provisions is essentially the same. *Crawford v. East Asiatic Co.*, 156 F. Supp. 571 (D.C. Cal. 1957).

This question first arose in the context of Indian law in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 674 (1974) where federal question jurisdiction for the purposes of § 1331 was challenged. This Court stated:

> There being no federal statute making the statutory or decisional law of the State of New York applicable to the reservations, the controlling law remained federal law and absent federal statutory guidance, the governing rule of decision would be fashioned by the federal court in the mode of the common law.

See also The New York Indians, 5 Wall 761, 769, 18 L.Ed. 708 (1866).

Here the Petitioner is obviously trying to impose laws arising from state statutes in an attempt to vest the state district court with subject matter jurisdiction over the Chickasaw Nation. The sovereignty of a state extends to everything that exists by its authority or is introduced by its permission. The Indian tribes do not exist by virtue of state action and the tribal powers are not vested by state action nor is permission from the state necessary for the exercise of tribal powers. The only inquiry therefore in this case is whether there is a state law question, independent and separate from federal law which can be resolved in state court. If it be not then the action is void ab initio. If it be so then the action is valid. However, there are no federal statutes which make Oklahoma's statutory or decisional laws applicable to the Chickasaw Nation in its activities on trust lands and therefore Oklahoma courts are not vested with subject matter jurisdiction to hear Petitioner's complaint. Therefore the controlling law in these matters remains federal law. *Oneida*, supra at 414 U.S. at 674. The "underlying right," if it exists, to vest Oklahoma courts with subject matter jurisdiction to impose Oklahoma's tax laws on the Chickasaw Nation arises not from the Oklahoma statutes cited in Petitioner's complaint, but rather from federal law, the existence of which is to be determined by the federal district court upon removal. Clearly, the underlying right to the claim asserted by the Petitioner has its very underpinning in federal law, not state law. The State cannot confer subject matter jurisdiction upon itself to enforce its laws on the Chickasaw Nation. Indeed this right may only be conferred upon the State by Congressional enactment. Such an underlying right must come from such an enactment and may never

have its origins in state law. The complaint in asserting a right to impose state law upon the Chickasaw Nation in the absence of subject matter jurisdiction over the cause conferred by federal law, facially presents federal question jurisdiction based on federal common law and statutes.

III. THE WELL-PLEADED COMPLAINT RULE IS INAPPLICABLE IN THIS CASE SINCE THE STATE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION OVER THIS CAUSE OF ACTION AND ANY ACTION TAKEN BY THE STATE COURT WOULD THEREFORE BE VOID FROM ITS INCEPTION.

This court stated in *Caterpillar v. Williams*, 482 U.S. ___, 96 L.Ed.2 318, 329 (1986) that:

> The [well-pleaded complaint] rule makes the Plaintiff the master of his complaint; he or she may avoid exclusive federal jurisdiction by exclusive reliance upon state law.

In the instant case, the Petitioner was obviously attempting to avoid federal court jurisdiction by pleading only state statutes as a jurisdictional basis for its cause of action against the Chickasaw Nation. The only federal question presented in this case is whether the state district court may unilaterally augment its jurisdiction by issuing orders to federally recognized Indian tribes such as the Chickasaw Nation in actions arising within Indian country. After this Honorable Court's decisions in *Williams v. Lee*, 358 U.S. 217 (1959); *Fisher v. District Court*, 424 U.S. 382 (1978); and *Kennerly v. District Court*, 400 U.S. 423 (1971), this question undoubtedly presents a substantial federal question on the face of the action in the state district court. The issue raised on the face

of such an action in state district court is the question of subject matter jurisdiction and only incidentally sovereign immunity. This federal question is obvious from a mere reading of Petitioner's complaint which names the Chickasaw Nation as a defendant and such federal questions may only be determined by a federal court. Oklahoma courts lack subject matter jurisdiction when the question presented regards actions of an Indian tribe in Indian country.

Oklahoma has never taken the requisite steps to assume jurisdiction, either civil or criminal, over matters arising in Indian country among Indian people. Absent such action Oklahoma has no subject matter jurisdiction over Indian people in Indian country. The question for decision is whether the state district court and the Oklahoma Tax Commission acting through this judicial forum is seeking to extend the judicial and legislative authority of the State against the Chickasaw Nation. Also, such action is completely preempted by Congressional enactment of the Act of August 15, 1953, 67 Stat. 588, as amended, 28 U.S.C. § 1360, which is commonly referred to as Pub. L. 280 and its 1968 amendments in Title IV of the Civil Rights Act of 1964 to require that all subsequent assertions of jurisdiction by states be preceeded by tribal consent Pub. L. 90-284, §§ 401, 402, 406, 82 Stat. 788, 25 U.S.C. §§ 1321, 1326 such actions are therefore removable to the United States District Court for the Eastern District of Oklahoma. Even had Oklahoma taken the necessary steps to acquire jurisdiction over Indian country, Pub. L. 280 was never intended to give subject matter jurisdiction to a state to bring an action against a federally recognized Indian tribe. In the case of *Three Affiliated*

Tribes v. Wold Engineering, Inc., 476 U.S. 877, 90 L.Ed.2d 881, 894-895, (1986), this Court stated:

> Pub. L. 280 certainly does not constitute a 'governing Act of Congress' which validates this type of interference with tribal immunity and self-government. We have never read Pub. L. 280 to constitute a waiver of tribal sovereign immunity, nor found Pub. L. 280 to represent an abandonment of the federal interest in guarding Indian self-governance. We explained in Bryan v. Itasca County, 426 U.S. 373, 387-388, 48 L Ed 2d 710, 96 S. Ct. 2102 (1976):
>
> 'Today's congressional policy toward reservation Indians may less clearly than in 1953 favor their assimilation, but Pub. L. 280 was plainly not meant to effect total assimilation. . . . [N]othing in its legislative history remotely suggests that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than 'private, voluntary organizations,' United States v. Mazurie, 419 U.S. 544, 557 [42 L.E.2d 706, 95 S. Ct. 710] (1975) . . . The Act itself refutes such an inference: there is notably absent any conferral of state jurisdiction over the tribes themselves, and § 4(c), 28 U.S.C. § 1360(c) [28 U.S.C.S. § 1360(c)], providing for the 'full force and effect' of any tribal ordinances or customs 'heretofore or hereafter adopted by an Indian tribe . . . if not inconsistent with

> any applicable civil law of the State,' contemplates the continuing vitality of tribal government.' (Footnote omitted).

Therefore an Oklahoma state court has no subject matter jurisdiction, in the absence of an express delegation of such authority to the State by Congress to enforce its laws upon an Indian tribe. If there is such authority for Petitioner to enforce its laws over the Chickasaw Nation, Petitioner should have alleged this authority in its complaint as a jurisdictional basis for its authority to impose its laws on the Chickasaw Nation. Petitioner failed to do so and this in and of itself renders Petitioner's complaint not well pleaded since the complaint on its faces alleges no jurisdictional basis for Oklahoma to impose its laws upon the Chickasaw Nation. Therefore the well-pleaded rule is not an issue in this case. Likewise this is a case in which a federal court would have original jurisdiction to determine if state tax laws may be applied to the Chickasaw Nation.

IV. PETITIONER'S COMPLAINT IS AN UNSUCCESSFUL ATTEMPT AT "ARTFUL PLEADING."

While not expressly characterizing Petitioner's complaint as "artful pleading," the circuit court clearly found that the Petitioner was attempting to conceal a necessary cause of federal action for the purpose of closing off the Chickasaw Nation's access to a federal forum. Judge Moore in his first opinion in this case said:

> The substance of the State's claim embraces the central jurisdictional issue we must decide in this case. Indeed, when we strip the State's claim of its statutory baggage, we are

> left with an action in which the State is attempting to enforce an essential element of its sovereignty, the power to tax, over an Indian tribe.
>
> This recognition underscores the implicit federal question lodged and focuses our inquiry [citations omitted] 822 F.2d 951, 954.

This Court acknowledged the "artful pleading" rule in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 397 (1981). In footnote 2 of Justice Rehnquist's opinion for this Court, he stated:

> . . . as one treatise puts it courts 'will not permit plaintiffs to use artful pleading to close off defendants' right to a federal forum . . . occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiffs characterization', 14 C. Wright A. Miller & Cooper, *Federal Practice and Procedure*, § 3722 pp 564-566 (1976) . . . the District Court applied that settled principal to the facts of this case. . . .

The recitation of a series of state statutes and couching the language of the complaint in terms of state law should not render the federal courts blind so that they may not use logic to deduce elements of a federal claim implicit on the face of a complaint nor should such practice be allowed to defeat or frustrate the intent of Congress. Yet this is exactly what the Petitioner has done in the instant case. Knowing that there is no Congressional enactment authorizing such an action against an Indian tribe, Petitioner simply pleaded state statutes as a basis for jurisdiction. However, the one element that the Petitioner could not conceal from the court was the naming of the Chickasaw Nation as a defendant, immediately raising a federal question which is exactly the nature of the circumstances stated above by Justice Rehnquist in *Moitie*, supra.

V. PETITIONER'S CLAIM IS COMPLETELY PREEMPTED BY FEDERAL LAW AND THEREFORE STATE COURTS LACK SUBJECT MATTER JURISDICTION TO ADJUDICATE THE RIGHTS OF AN INDIAN TRIBE IN INDIAN COUNTRY.

In regard to subject matter jurisdiction of state courts to adjudicate questions involving Indian tribes in Indian country the area has been completely preempted by acts of Congress. The concept of complete federal preemption is most clear when the subject is totally and absolutely dependent on the will of Congress as is the case with Indian tribes. However, in *Caterpillar* this Court, citing *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1 (1983) stated:

> There does exist however, an 'independent corollary' to the well pleaded complaint rule . . . known as the 'complete preemption doctrine. On occasion, the court has concluded that the preemption force of a statute is so 'extraordinary' that it converts an ordinary state common law complaint into one stating a federal claim for the purposes of the well pleaded complaint rule. Once an area of state law has been completely preempted, a claim based on that preempted state law is considered, from its inception, a federal claim and

> therefore arises under federal law. See Franchise Tax Board . . . ('If a federal cause of action completely preempts a state cause of action, any complaint that comes within the scope of the federal cause of action necessarily 'arises under federal law').

The State's claim is in all aspects an assertion of state governmental authority over the Chickasaw Nation, as distinguished from the numerous state common law and contract claims upon which the Petitioner has based his argument. In other words, Petitioner's claim is that State law authorizes the exercise of legislative and judicial authority over the Chickasaw Nation. Therefore, any action instituted in a state court against an Indian tribe, prima facie, raises a federal question which is within the exclusive jurisdiction of the federal court to determine the width and breadth of federal preemption of state action.

In effect the State's claim is not a claim under state common law but a claim of governmental authority over an Indian tribe which necessarily implicates only federal law. The mere filing of such an action asserting state authority in a state court on its face is grounds for federal removal. Congress' intent that federal law control the elements of the Petitioner's claims to governmental authority over the Chickasaw Nation is clear from the face of the regulatory plan adopted in Pub. L. 280 in that Congress could not have intended to replace the positive federal law in this area with state law except in accordance with Pub. L. 280 and equally important, because the governing law regarding subject matter jurisdiction of state courts over Indian tribes has already been judicially determined by this Honorable Court.

The frustration of being confronted by a preemption analysis regarding the validity of a plaintiff's claim and a rule which instructs against accepting it in a federal question context is more easily resolved in cases such as the present into which almost 200 years of federal substantive law controls this area of the law and is plenary. Therefore state control of the same area is nonexistent. The extent of governmental authority over Indian tribes legitimately exercised by states is exclusively referenced by federal, not state law. The exercise of governmental authority over Indian tribes is not traditionally left to state law. Rather the government scheme is set forth in Pub. L. 280 and in the judicial determinations of this Court. The ordinary situation presents claims otherwise under state law, or competing claims between federal and state law as it applies to the same area of inquiry wherein the Plaintiff has a choice of forums depending on which law the Plaintiff chooses to plead. This is not the case when only a federal forum is available to the Plaintiff (here the State of Oklahoma) in an assertion by the State that its taxation laws are the governing laws regarding taxation over an Indian tribe, in absence of specific Congressional authority to do so.

The Indian law case herein provides a less troublesome aspect of the principles of the well-pleaded complaint rule since there is no body of state law which could be applied in the instant case. Therefore, this is a situation where the corollary rule of the well-pleaded complaint rule is most appropo since the entire body of Indian law is based on statutes, court decisions and the federal common law. This situation is unique in that all other cases which have come to

amicus' attention have involved fact situations based on state common law schemes or by breach of contract action. The corollary rule is particularly cogent in Indian law cases in which courts are being called upon in situations where states are competitors with the Indian tribes and the federal government for governmental authority in Indian country. The Tenth Circuit's decision in the case does no violence to the rule of *Caterpillar*, supra. Rather, it simply follows the rule of "artful pleading" and the test set forth in *Franchise Tax Board*, supra.

It is clear that Petitioner's complaint fails to expressly allege that the activities against which it obtained a temporary restraining order were being conducted by the Chickasaw Nation in Indian Country. Situations such as this necessitate the complete preemption corollary. Otherwise Petitioner could frustrate the will of Congress by attempting to conceal a necessarily federal claim.

Petitioner cites 68 O.S. § 232 which authorizes injuntive relief to enforce state tax laws as authority for this suit.[1] The federal statute authorizing state court jurisdiction over Indian country is the Act of August 15, 1953, 67 Stat. 5888, as amended, 28 U.S.C. § 1360 and 25 U.S.C. § 1322, commonly known as Pub. L. 280. Amicus submit that this statute and federal common law completely preempts the petitioner's state statutory cause of action against Indian tribes. In *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 884-885 (1986), Justice O'Connor speaking for the majority of the Court said:

[1] This is especially noteworthy in light of the fact that the asserted State law does not include Indian tribes in the definition of entities to be taxed.

> "Public Law 280 represents the primary expression of federal policy governing the assumption by states of civil and criminal jurisdiction over the Indian Nations . . .
>
> . . . In examining the effect of comprehensive legislation governing Indian matters such as this, "our cases have rejected a narrow focus on congressional intent to preempt state law as the sole touchstone. They have also rejected the proposition that preemption requires 'an express congressional statement to effect'. [omitting citations]
>
> . . . Rather, we have found that where a detailed federal regulatory scheme exists and where its general thrust will be impaired by incompatible state action, that state action, without more, may be ruled preempted by federal law." [omitting citations]

This statement by the Court manifestly shows that Congress has expressed its intent to completely preempt state law relating to state court jurisdiction over state causes of action against Indian tribes. Oklahoma has never met the requirements of Pub. L. 280. Petitioner's blatant attempt at an application of state statutes in a state court to enjoin tribal activities is completely incompatible with the preemptive force of congressional prerogative.

Simply naming an Indian tribe as a party defendant in a suit immediately raises the issue of subject matter jurisdiction. The Congress could have hardly stated its policy of federal preemption over matters of Indian law with more clarity than by way of Pub. L. 280. Petitioner has been greatly perturbed and generally

unwilling to accept the fact that federal law determines the State's course of action in regard to Indian tribes. This sort of unwillingness was early on noted in the case of *United States v. Kagama*, 118 U.S. 317, 383 (1886) wherein this Court stated: "Because of the local ill feeling the people of the states where they [Indian people] are found are often their deadliest enemies." This seems to be true in regard to Petitioner Oklahoma Tax Commission, since winning few, if any, cases against Indian tribes and people in Oklahoma has seemed to fuel Petitioner's interest in filing more and more litigation against Indian tribes and people in a seemingly concerted effort to diminish the rights and privileges which Indian tribes and people enjoy in Indian country.

In the case of *Oneida Indian Tribe v. Oneida County*, 414 U.S. 661 (1973) the question involved federally protected land, but the holding is no less relevant to the question of lack of subject matter jurisdiction by the state court. "There being no federal statute making the statutory or decisional law of the State of New York applicable to the reservations, the controlling law remained federal law; and, absent statutory guidance, the governing rule of decision would be fashioned by federal court in the mode of the common law." 414 U.S. 661, 674. Therefore, even if the federal statutes did not completely preempt state court jurisdiction it is clear that federal common law would do so since there is no federal statute making Oklahoma's statutes governing this type of taxation and injunctive relief applicable to Indian tribes. Petitioner's asserted right to enforce its laws via coercive state court jurisdiction and, as the case was here, the court's predisposition to exercise its

"jurisdiction" by ex parte injunctive relief, is inconsistent with this Court's frequent holding that Congress retains plenary discretion to decide when such right may exist. Complete preemption necessitates federal court jurisdiction to adjudicate whether subject matter jurisdiction exists in the state courts.

VI. THE CHICKASAW RESERVATION IN OKLAHOMA HAS NOT BEEN DISESTABLISHED BY CONGRESS.

Amicus now turns to Petitioner's novel theory that Oklahoma Indian tribes are less deserving of governmental recognition and attending attributes than other tribes in the United States. This Court in *Solem v. Bartlett*, 465 U.S. 463, 470 (1984) reiterated the rule that "[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plats within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise". [citing *United States v. Celestine*, 215, U.S. 278, 285, (1909)]. Simply alloting the lands out in individual plats within the area does not change its reservation character.

Amicus have studied the legislation resulting in alloting the Chickasaw lands in severalty and preparing for Oklahoma's admission as a state and find no expression on the part of Congress to disestablish the tribe's reservation. Essentially these Acts of Congress provided for allotments in severalty to tribal members and sales of surplus lands for an undisclosed sum to be deposited for the benefit of the tribe. The tribe retained some lands including schools, churches, tribal government buildings, mineral rights, etc. It continues today, to own considerable surplus lands that were not sold. There is no doubt that the sale of surplus land was for the purposes of facilitating non-Indian

settlement on the reservation but that does not manifest congressional intent to disestablish it. The dealings with the Chickasaw were akin to the situation in *Mattz v. Arnett*, 412 U.S. 481 (1973) where the Court held that an Act which provided for opening lands for settlement, alloting tracts to tribal members and sale of the surplus for an undisclosed sum to be deposited for the tribes benefit did not evidence an intent to terminate the reservation status of the entire area. It cannot be denied that most members of Congress at the time of the Chickasaw allotment process thought that this would eventually terminate tribal existence. But, as this Court said in *Solem* at 468, "the Congresses that passed the Surplus Land Acts anticipated the imminent demise of the reservation and, in fact, passed the Acts partially to facilitate the process. We have never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations . . ."

A few years later the country began to take a dim view of these former termination policies. The advent of this new policy, as it related to the Chickasaws, came with the Oklahoma Indian Welfare Act of 1936. The OIWA stopped the allotment of Oklahoma's Indian lands and allowed the tribes to reorganize their shambled governments. This brings us back to the Curtis Bill, supra, which is the Petitioner's primary authority for the proposition that Congress has disestablished all reservations in Oklahoma making it an "assimilated state." It is apparent that Petitioner is not aware of *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439 (D.C. Cir. 1988) where the Court held that the OIWA repealed the Curtis Bill for all purposes. Reversing the district court's holding that the Creek

Nation had no power to establish tribal courts with civil and criminal jurisdiction, the circuit court said:

> It (OIWA) appears to cover the 'whole subject' of the earlier legislation. It would be absurd to hold that isolated portions of the Curtis Act . . . survive even through the statutory context in which they appeared—allotment and assimilation—has been stripped away by OIWA, at 1445.

Whatever the Congress might have done earlier the notion of Oklahoma being an "assimilated state" was laid to rest in 1936.

Regardless of the destruction of the tribe's land base due to the assimilationist and termination policies of the United States in the late nineteenth century and contrary to the erroneous statement by Petitioner on page 23 of its brief, the tribal government remained intact and the federal government retained jurisdiction over them. The Five Civilized Tribes Act of April 26, 1906, 34 Stat. 137 § 28 expressly provided that the tribal governments were continued "until otherwise provided by law." While it is true that the tribal governments were much restricted by these congressional acts and were not very effective for several years thereafter, it is clear that the tribal governments were to remain. *Creek County v. Seber*, 318 U.S. 705, 718 (1943); *United States v. Ramsey*, 271 U.S. 467, 469 (1926); *Tiger v. Western Inv. Co.*, 221 U.S. 286, 309 (1911).

The executive branch recently recognized the continual existence of the treaty boundaries of the Chickasaw Nation when the Secretary of the Interior approved its present constitution in 1983. The pream-

ble of the Chickasaw Constitution "establishes the tribal government "within the . . . limits" of the original reservation. Sulphur, Oklahoma, and the Chickasaw Motor Inn are within those limits. Petitioner's assertion that the Chickasaw reservation has been disestablished is without merit. Even had it been, that situation was reversed by the OIWA.

VII. STATE COURTS LACK SUBJECT MATTER JURISDICTION OVER INDIAN TRIBES AS TO MATTERS ARISING IN INDIAN COUNTRY.

This Court does not have to decide whether the original Chickasaw reservation in Oklahoma has been disestablished. The question of whether the conduct of Indians has occurred on "Indian country" has increasingly become the benchmark for allocation of federal, tribal, and state civil and criminal jurisdiction. *California v. Cabazon Band of Indians*, 107 S.Ct. 1083, 1087 & N.5 (1987); *DeCoteau v. District County Court*, 420 U.S. 425, 427-428 & N.2 (1971); *Indian Country U.S.A. Inc. v. State of Oklahoma*, 829 F.2d 967 (10th Cir. 1987) cert. denied sub nom; *Oklahoma Tax Comm. v. Muscogee (Creek) Nation*, 108 S.Ct. 2870 (1988). See also Felix S. Cohen, *Handbook of Federal Indian Law* 5-8 (1942). Congress has defined "Indian country" for purposes of determining federal criminal jurisdiction in 18 U.S.C. § 1511(a) (1948) to include "all land within the limits of any Indian reservation under the jurisdiction of the United State Government, . . ." The Indian Child Welfare Act of 1978, 92 Stat. 3069, 25 U.S.C. § 1903(10) provides:

> Reservation means Indian country as defined in section 1151 of title 18 and any lands, not covered under such action, title to which is either held by the United States in trust for

> the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

Recently Congress passed Senate Bill 555, Indian Gaming Regulatory Act, reported on September 15, 1988, Congressional Record - Senate S 12657. Section 4(4)(B) defines "Indian lands" as:

> Any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual . . . and over which an Indian tribe exercises governmental power.

Section 23 of this act uses the term "Indian country" instead of "Indian lands" a number of times.

This Court has designated lands as "Indian country" where title was held in a variety of ways. *United States v. Pelican*, 232 U.S. 442, 449 (1914); *United States v. McGowan*, 302 U.S. 535, 538-539 (1938); *United States v. Chavez*, 290 U.S. 357, 364 (1933); *United States v. John*, 437 U.S. 634, 649 (1978). The principal test applied by the courts is found in *Pelican* at 439, i.e. tribally-owned lands "devoted to Indian occupancy . . . validly set apart for the use of Indians". This includes lands held in trust for a tribe by the United States, *John* at 649. This is also the test applied in at least four circuits. *United States v. Sohappy*, 770 F.2d 816, 822-823 (9th Cir. 1985); *Langly v. Ryder*, 778 F.2d 1092, 1095 (5th Cir. 1985); *United States v. Agure*, 801 F.2d 336 (8th Cir. 1986); *Cheyenne-Arapaho Tribes v. State of Oklahoma*, 618 F.2d 665, 667-668 (10th Cir. 1980); See also *State of Washington v. Sohappy*, 757 P.2d 509, 511 (Wash. 1988).

The Petitioner apparently made the same argument to the Circuit Court in *Indian Country, U.S.A.*, supra, that it does here, i.e. the Creek Nation reservation had been disestablished. The Court here said at 975 N.3:

> The State seems to believe that the Indian country status of the Mackey site rests on whether the exterior boundaries of the 1866 Creek reservation have been disestablished. It does not. Our inquiry is narrower: whether Congress has divested the unallotted Creek tribal lands of their Indian country status. The disestablishment question is primarily important for determining the status of non-Indian lands, which remain Indian country under 18 U.S.C. § 1511(a) until the surrounding portion of a reservation is disestablished. *Tribal lands, trust lands, and certain allotted lands generally remain Indian country despite disestablishment.* [emphasis supplied] See, e.g., *Solem*, 465 U.S. at 467 n.8, 104 S.Ct. at 1164 n.8; *DeCoteau*, 420 U.S. at 428, 95 S.Ct. at 1085.

The term "reservation" and "Indian country" are used interchangeably by the Congress and the courts. The primary meaning of both terms is to describe federally-protected Indian tribal lands. *Felix S. Cohen's Handbook of Federal Indian Law* (1982 ed.) at 35 n.66. Thus, the terms "Indian country" and "reservation" have come to mean "those lands which Congress has set apart for tribal and federal jurisdiction". *Indian Country, U.S.A.* at 973. It should be noted that the Oklahoma Supreme Court has also recognized the importance of this classification:

> The touchstone for allocating authority among the various governments has been the concept of 'Indian Country', a legal term delineating the territorial boundaries of federal, state, and tribal jurisdiction. Historically, the conduct of Indians and interests in Indian property within Indian country have been matters of federal and tribal concern. Outside Indian country, state jurisdiction has obtained.

Ahboah v. Housing Authority of the Kiowa Tribe, 660 P.2d 625, 627 (Okl. 1983). See also *State v. Burnett*, 671 P.2d 1165 (Okl. Cr. 1983).

The Chickasaw Motor Inn property was conveyed to and accepted by the United States in trust. (JA 16) This was done for reasons that should be obvious. It was the intent of both the Chickasaw Nation and the United States that this tract of land would be removed from the jurisdiction of the State of Oklahoma. The Petitioner has had much difficulty in accepting this but as the Court said in *Oneida*, at 678:

> There has been recurring tension between federal and state law; state authorities have not easily accepted the notion that federal law and federal courts must be deemed the controlling considerations in dealing with the Indians.

Mescalero, supra, upon which Petitioner basically rests its whole case, when coupled with the obiter dicta found in *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943) should not be applied here for several reasons. First, subject matter jurisdiction from suit was not at issue there. Second, the leased

lands involved in *Mescalero* were located outside tribe's recognized reservation. The Chickasaw Motor Inn is located within the exterior boundaries of its original reservation, Treaty of 1837, and the territorial boundaries for its present day government which have been approved by the federal executive department. Chickasaw Constitution, preamble. Third, New Mexico's Enabling Act makes a distinction between on and off reservation activities for taxing Indian tribes. *Mescalero* at 149-150. Oklahoma's Enabling Act has no such provision. Congress expressly granted New Mexico more powers over Indians than it did Oklahoma. Oklahoma's authority is restricted to the power given it by federal common law. The issue there was whether the area was on or off a "reservation" not whether the area was "Indian country". Footnote 11 at 155 of the Court's opinion contains dicta which indicates the leased lands would be accorded the same "Indian country" status as lands purchased by or conveyed in trust to the United States. However, this conclusion was reached in an entirely different context than here. There the issue was whether taxes might be applied to both the improvements on the land and income therefrom. Here the issue is whether the courts' have subject matter jurisdiction. Last, *Oklahoma Tax Commission*, supra, was decided in 1943. This was before Congress changed the definition of Indian Country in 1948 at 18 U.S.C. § 1151. The 1948 amendment and this Court's decisions clearly accord Indian lands in Oklahoma the same status as reservation lands in other states. *State v. Littlechief*, 573 P.2d 263 (Okl. Cr. 1978).

In *Mescalero*, the lands were not owned by the tribes but merely leased with perhaps, the thought

by the tribe that it would be immune from taxation as a federal instrumentality. In the present case the Chickasaw Nation first owned the lands in question. They subsequently conveyed them to the United States who accepted them in trust. Amicus submit that this was accomplished with the calculated intent on both parties to cause the property to be unquestionably "Indian country" free of taxation and regulation by the state and under the control and jurisdiction of the tribe and the federal government.

Lastly, if *Mescalero* stands for the proposition that lands acquired in trust under 25 U.S.C. § 465 and § 501 do not merit "Indian country" and "reservation" status, then that aspect of the decision was overruled by *John*, supra, five years later.

Petitioner contends that causes arising out of tribal conduct on "Indian country" should not deprive state courts of subject matter jurisidction because it interferes with its Tenth Amendment rights. Petitioner asserts that "Congress has sought to wield its power in a fashion that would impair the State's ability to function effectively in a federal system. This is in reference to the application of 18 U.S.C. § 1151 for purposes of civil jurisdiction. Its whole argument on this subject is meritless and fails for a number of reasons, the first of which is that there are other definitions of "Indian country." See *Pelican, McGowan, John*, etc., supra.

The Tenth Amendment rights asserted by Petitioner pale when tribal autonomy and the unique trust relationship tribes have with the federal government is considered. Accordingly, the Court has consistently declared that the authority of Congress over Indian tribes is plenary. The plenary congressional control

over Indians is necessary to fulfill the federal trust responsibility. These principles have been reaffirmed so many times cited authority is not necessary. The Oklahoma Supreme Court has accepted the term plenary to mean "full, entire, complete, absolute, perfect and unqualified". *Mashunkashey v. Mashunkashey*, 134 P.2d 976, 979 (Okl. 1942); *see also* The Federalist No. 42 by Madison, Tudor Publishing Co., (1937) P. 285, 290. And, as this Court said in *Seber* at 718, supra, "the fact that the Acts . . . may possibly embarrass the finances of a state or one of its subdivisions is for the consideration of Congress not the Courts."

Oklahoma's Enabling Act retained federal control and law making powers regarding the State's Indians and Indian tribes. *Mashunkashey* at 979, *Ex Parte Webb*, 225 U.S. 663, 677 (1912).

CONCLUSION

For the above state reasons the decision of the Tenth Circuit Court of Appeals should be affirmed.

Respectfully Submitted,

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